

1
2
3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 KIRK O.,
8
9
10

v.
Plaintiff,

NANCY A. BERRYHILL, Deputy
Commissioner of Social Security
Operations,

Defendant.

Case No. 3:17-cv-05844-TLF

ORDER AFFIRMING
DEFENDANT'S DECISION TO
DENY BENEFITS

12 Kirk O. has brought this matter for judicial review of defendant's denial of his
13 application for disability insurance benefits. The parties have consented to have this matter heard
14 by the undersigned Magistrate Judge. 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73;
15 Local Rule MJR 13. For the reasons set forth below, the undersigned affirms defendant's
16 decision to deny benefits.

17 FACTUAL AND PROCEDURAL HISTORY

18 On March 18, 2014, plaintiff filed an application for a period of disability and disability
19 insurance benefits. Dkt. 6, Administrative Record (AR) 16. He alleged that he became disabled
20 beginning January 1, 2014. The application was denied by the Social Security Administration on
21 August 4, 2014, and reconsideration was denied on December 14, 2014. *Id.* A hearing was held
22 before an administrative law judge ("ALJ"), at which plaintiff appeared and testified, as did a
23 vocational expert. *Id.*

1 In a decision dated May 18, 2016, the ALJ found that plaintiff was not disabled. AR 26-
2 27. Plaintiff's request for review was denied by the Appeals Council on August 21, 2017,
3 making the ALJ's decision the final decision of the Commissioner. AR 1. Plaintiff appealed to
4 this Court on October 20, 2017. Dkt. 1; 20 C.F.R. § 404.981.

5 In his May 2016 decision, the ALJ resolved steps one and two of the five-step sequential
6 analysis in plaintiff's favor. AR 18. The ALJ found that the plaintiff had not engaged in
7 substantial gainful activity since the alleged onset of his disability and that he had the following
8 severe impairments: dysfunction of major joints, affective disorder (depression and bipolar
9 disorder), and visual impairment with two cataract surgeries. *Id.* At step three, the ALJ found
10 that the plaintiff does not have an impairment or combination of impairments that meets or
11 medically equals the severity of one of the impairments listed in the Social Security
12 Administration's regulations. AR 19.

13 In assessing the plaintiff's residual functional capacity (RFC), the ALJ found that the
14 plaintiff had the residual functional capacity (RFC)

15 **to perform medium work as defined in 20 CFR 404.1567(c) except the**
16 **claimant can frequently climb ladders, ropes, scaffolds, and crawl. The**
17 **claimant is limited to pushing and pulling with the right upper extremity as**
18 **much as he is able to lift and carry. The claimant can occasionally reach**
19 **overhead with the left upper extremity. The claimant can perform simple,**
20 **routine, and some complex tasks, but cannot perform detailed complex tasks**
on a routine basis. Additionally, the claimant is limited to simple work-
related decisions with few workplace changes. The claimant is limited to
superficial contact with the general public. The claimant should avoid
concentrated exposure to work hazards. The claimant can perform jobs that
would involve frequent near acuity.

21 AR 21 (emphasis in original). Because of this assessment of the plaintiff's RFC, the ALJ found
22 that the plaintiff was not disabled because there were a number of jobs that exist in significant
23 numbers in the national economy that the plaintiff could perform. AR 26-27.

1 Plaintiff seeks reversal of the ALJ's decision and remand for an award of benefits. He
2 alleges that the ALJ erred in discounting his subjective testimony and, consequently, in assessing
3 his residual functional capacity and finding he can perform jobs existing in significant numbers
4 in the national economy. Dkt. 11.

5 For the reasons set forth below, the Court finds that the ALJ did not err in assessing
6 plaintiff's testimony, and therefore that he did not err in determining the plaintiff's residual
7 functional capacity and that he is not disabled.

8 DISCUSSION

9 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal error;
10 or (2) the decision is not supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648,
11 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a reasonable mind might
12 accept as adequate to support a conclusion.” *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir.
13 2017) (quoting *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.
14 1988)). This requires “more than a mere scintilla,” though “less than a preponderance” of the
15 evidence. *Id.* (quoting *Desrosiers*, 846 F.2d at 576).

16 The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759
17 F.3d 995, 1009 (9th Cir. 2014). The Court is required to weigh both the evidence that supports,
18 and evidence that does not support, the ALJ's conclusion. *Id.* The Court may not affirm the
19 decision of the ALJ for a reason upon which the ALJ did not rely. *Id.* Only the reasons identified
20 by the ALJ are considered in the scope of the Court's review. *Id.*

21 “If the evidence admits of more than one rational interpretation,” that decision must be
22 upheld. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). That is, “[w]here there is conflicting
23 evidence sufficient to support either outcome,” the Court “must affirm the decision actually
24 made.” *Allen*, 749 F.2d at 579 (quoting *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).

1 The ALJ's Assessment of Plaintiff's Symptom Testimony

2 Plaintiff contends that the ALJ erred in discounting his subjective testimony.

3 Questions of credibility are solely within the control of the ALJ. *Sample v. Schweiker*,
4 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-guess” this credibility
5 determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may
6 not reverse a credibility determination where that determination is based on contradictory or
7 ambiguous evidence. *See id.* at 579. Even if the reasons for discrediting a claimant’s testimony
8 are properly discounted, that does not render the ALJ’s determination invalid as long as that
9 determination is supported by substantial evidence. *See Tonapetyan v. Halter*, 242 F.3d 1144,
10 1148 (9th Cir. 2001).

11 When gauging a plaintiff’s credibility, an ALJ must engage in a two-step process. First,
12 the ALJ must determine whether there is objective medical evidence of an underlying
13 impairment that could reasonably be expected to produce some degree of the alleged symptoms.
14 *Smolen v. Chater*, 80 F.3d 1273, 1281-82 (9th Cir. 1996). If the first step is satisfied, and
15 provided there is no evidence of malingering, the second step allows the ALJ to reject the
16 claimant’s testimony of the severity of symptoms if the ALJ can provide specific findings and
17 clear and convincing reasons for rejecting the claimant’s testimony. *Id.* To reject a claimant’s
18 subjective complaints, the ALJ must provide “specific, cogent reasons for the disbelief.” *Lester*
19 *v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (citation omitted). The ALJ “must identify what
20 testimony is not credible and what evidence undermines the claimant’s complaints.” *Id.*; *see also*
21 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

22 Here, plaintiff testified that he could no longer work as an electrician because his
23 eyesight was worsening and causing him to make mistakes. AR 40. He testified that he had
24 ADHD since he was in school and that it affected his ability to prioritize and concentrate. AR 41.

1 He testified that although he had ADHD throughout his 35-year career, it had been getting
2 worse. AR 42.

3 He said that he quit, rather than retire, because, "I was afraid of losing my job, 'cause of
4 the reprimands, not following orders, and concentration and memory." AR 44. He said that he
5 could not perform less demanding work because, "I'm just to[o] flaky. My memory's bad. I'm
6 unorganized. I have trouble reading . . . [and] understanding." AR 44. He added that he is "not
7 good with people, either." AR 45. He said that his pain was a 7 of 10 and, physically, he had
8 good and bad days. AR 45-46. He said that his lower back, left shoulder, and right bicep muscle
9 caused him pain, and that his bicep pain prevents him from "reach[ing] back or pick[ing up]
10 anything heavy." AR 46-47; *see* AR 214.

11 As discussed below, the ALJ addressed plaintiff's testimony about his mental health,
12 physical condition, and vision problems. In each of these areas, the Court concludes that the ALJ
13 gave clear and convincing reasons to discount plaintiff's testimony about the severity of his
14 symptoms. *See* AR 22-25.

15 *Mental-Health Issues*

16 The ALJ acknowledged plaintiff's history of treatment for mental-health issues, including
17 "multiple psychotropic medications for bipolar disorder, depression, and ADHD." AR 24-25.
18 The ALJ reviewed plaintiff's treatment notes in detail. *Id.* He found that they contain
19 unremarkable clinical observations and mental status examinations and indicate that plaintiff's
20 mental health was generally stable. *Id.*; *see* AR 276-77, 280, 285 (bipolar and ADHD managed
21 with medications), 294-96, 357-59.

22 The ALJ found that plaintiff's treatment notes contain subjective complaints and some
23 clinical observations of problems with memory, focus, and concentration, and confirm that
24

1 plaintiff has “a history of depression, bipolar disorder and ADHD.” *Id.*; see AR 285, 294, 483,
2 488. But, the ALJ concluded, the latter conditions “are well-managed by medication and do not
3 preclude [plaintiff’s] ability to perform unskilled work.” AR 25.

4 Regarding a provider’s observation of significant memory impairment, the ALJ found
5 that “this limitation is inconsistent with the prior benign mental status examinations, stable
6 condition, and effective psychotropic medications the treatment notes consistently documented.”
7 *See* AR 487-88. The ALJ thus found that “limited routine mental health treatment” has helped
8 plaintiff’s mental symptoms. AR 25.

9 The ALJ further noted the relatively conservative treatment plaintiff has received --
10 noting that plaintiff has not had psychiatric counseling or therapy, or emergency room treatment,
11 and has not been hospitalized. He also observed that although plaintiff was prescribed
12 medications by 2010, he still performed a skilled job through 2013.¹ AR 25.

13 With respect to plaintiff’s ADHD, the ALJ noted that plaintiff worked “for decades” as
14 an electrician before stopping in December 2013. AR 22. He reasoned that if plaintiff “had been
15 suffering from severe ADHD symptoms, he would not have been able to perform such a
16 mentally demanding skilled job.” *Id.*

17 Finally, the ALJ found that plaintiff stopped working for reasons unrelated to his
18 impairments: the ALJ noted that plaintiff told providers he stopped working in January 2014
19 because he retired and found that this “implies that any medical reasons were not primary in his
20 mind.” AR 22; *see* 278, 357, 482. The ALJ found it “[m]ore telling,” however, that plaintiff “had
21 no medically documented physical trauma, severe exacerbation, or rapidly progressive medical
22 condition at the end of 2013” that could have caused his retirement. AR 22.

23
24

¹ The ALJ wrote “2014,” but this appears to be a typo as plaintiff retired in December 2013. *See* AR 39.

1 Plaintiff contends that because the ALJ failed to acknowledge “the medical provider’s
2 notes of increasing difficulty in activities from 2013 on forward,” the record does not support the
3 ALJ’s findings that “his mental issues are controlled and he had worked despite them.” Dkt. 11,
4 p. 6. He then lists numerous items from the medical record that pertain to each of his conditions,
5 mental and physical. Dkt. 11, pp. 6-8. These include many records that the ALJ acknowledged,
6 such as a mental status exam showing blunted affect, fair insight and judgment, and reported
7 difficulties in concentration and focus, a 2013 refractory diagnosis, self-reported vertigo as a side
8 effect of medication, and x-ray results showing “a right scoliotic curve in the upper dorsal
9 region.” AR 23-24; *see* 279, 295-96, 530, 536.

10 Plaintiff asserts that the ALJ’s emphasis on “whether the diagnostic tests showed
11 dramatic issues that would require surgery or some dramatic procedure is misplaced” because
12 “[t]he ALJ is not a doctor.” Dkt. 11, p. 8. He further asserts: “No doctor questioned Plaintiff’s
13 difficulty with concentration, his dizziness, his report of pain. Only the ALJ does.” *Id.*

14 Plaintiff’s arguments are misplaced. A social-security claimant has the burden of proof in
15 the first four steps of the five-step evaluation process. 20 C.F.R. § 404.1529(a)(1); *Tackett v.*
16 *Apfel*, 180 F.3d 1094, 1098 & n.3 (9th Cir. 1999) (observing that “the application of burdens of
17 proof is particularly elusive in cases involving social security benefits, in part because the
18 proceedings are not designed to be adversarial” [internal quotation marks omitted]). The ALJ,
19 not plaintiff’s doctors, was tasked with determining what weight to give his subjective testimony
20 about the severity of his symptoms. 20 C.F.R. § 404.1529(c).

21 Although plaintiff asks the Court to infer that his medical providers credited his reported
22 limitations, and to further find that those limitations amounted to disability, the record contains
23
24

1 no opinions from those providers about functional limitations. Plaintiff does not identify an error
2 of law in the ALJ's consideration of his medical records.

3 Moreover, the ALJ could properly infer the level of concern plaintiff's providers have
4 about his conditions—and what this says about those conditions' severity and impact on his
5 ability to perform work functions—from the treatment they prescribed. *Tommasetti v. Astrue*,
6 533 F.3d 1035, 1039 (9th Cir. 2008); *see also Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir.
7 1999) (upholding ALJ finding that claimant's testimony “that she experienced pain approaching
8 the highest level imaginable was inconsistent with the ‘minimal, conservative treatment’ that she
9 received”). In particular, the ALJ could reasonably infer from plaintiff's conservative mental-
10 health treatment that his affective disorders were not as severe as plaintiff alleged. AR 24-25.
11 Substantial evidence supports that inference here. *See* AR 276-77, 280, 285, 296, 488.

12 The record likewise supports the ALJ's findings that plaintiff was consistently assessed to
13 have stable mental health and that his mental-health providers found his medications were
14 effective; he did not pursue more aggressive treatment. *See* AR 276-77, 280, 285, 296. These,
15 too, are valid reasons to discount plaintiff's subjective statements. *See* 20 C.F.R. §
16 404.1529(c)(3); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

17 Finally, plaintiff's ability to perform highly skilled work for decades is a clear and
18 convincing reason to discount his testimony about limitations due to ADHD, which he testified
19 that he suffered from since childhood. AR 41; *see Gregory v. Bowen*, 844 F.2d 664, 666-67 (9th
20 Cir. 1988) (“Furthermore, substantial evidence indicated that the condition of Gregory's back
21 had remained constant for a number of years and that her back problems had not prevented her
22 from working over that time.”).

1 Plaintiff's ability to perform that work for at least three years after receiving treatment for
2 his affective disorders, without significant deterioration in that time, also supports the ALJ's
3 decision to discount his testimony about the severity of those conditions. *See* AR 25, 52. Plaintiff
4 contends that the ALJ erred in relying on a finding that he "retired" rather than quitting due to his
5 medical impairments. Substantial evidence supports the ALJ's finding that plaintiff stopped
6 working for non-disability reasons – the contemporary record is from a doctor's visit notes:
7 "Reports that he retired this past Friday. Wasn't really ready, but was frustrated with company
8 changes and a contract negotiation was coming up, so it seemed like the right time. He says they
9 didn't 'allow you to feel successful.'" AR 278.

10 Plaintiff contends primarily that the ALJ should have inferred -- from the fact that he was
11 making a lot of money before he stopped working – the plaintiff would not have retired unless
12 his impairments made him do so. Dkt. 11, pp. 5-6. The Court finds no basis for such an
13 inference, which is entirely speculative.

14 Plaintiff also argues that the ALJ could not rely on these treatment notes because they
15 may not be the plaintiff's exact words, but rather a doctor's notes recounting plaintiff's words.
16 Dkt. 11, p. 5. The Court is aware of no such standard for evidence in a social-security appeal.
17 Finally, plaintiff contends that the ALJ should have discussed a note from April 2014 stating,
18 "Continues in retirement, but is also applying for disability, due to his age and his issues with the
19 dizzy spells which limit his ability to work safely in his field." AR 294. The ALJ did not err in
20 relying on plaintiff's contemporary report rather than an explanation he gave several months
21 later to explain his application for disability benefits. *See Vincent on Behalf of Vincent v.*
22 *Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (ALJ not required to discuss every item of

23
24
25

1 evidence, only to “explain why significant probative evidence has been rejected” [internal
2 quotation marks omitted]).

3 *Physical Conditions*

4 In the RFC, the ALJ limited plaintiff to medium work with additional limitations
5 including, among others, only occasional overhead reaching. AR 21. But the ALJ found that
6 plaintiff’s medical records undermined his complaints about more severe pain and more limiting
7 physical impairments. AR 23.

8 The ALJ reviewed results of physical examinations and x-ray imaging. AR 23. These
9 showed that plaintiff has been seen for complaints of back and shoulder pain, and that exams
10 have resulted in a diagnosis of left shoulder tendinitis. AR 334. Notes from physical therapy for
11 his shoulder observed that he was limited in his activities but had a “good” prognosis, and
12 observed improvement in subsequent visits. AR 344, 348, 350-51. Likewise, other treatment
13 notes showed that plaintiff had received chiropractic treatment for neck and spine problems and
14 that these had shown improvement. AR 515, 518. The ALJ observed that a CT scan had shown
15 “multilevel degenerative disc and spondylitic change in the lower cervical region” of the neck
16 “but revealed no acute disease.” AR 23, 537.

17 The ALJ further noted the “limited and routine treatment” that plaintiff received for
18 major joint dysfunction, including “brief chiropractic and physical therapy treatment.” AR 23.
19 The ALJ noted that plaintiff’s treatment did not include injections, regular narcotic pain
20 medications, visits to a pain doctor, pain management, or surgical intervention. The ALJ found
21 that this conservative treatment contradicted plaintiff’s testimony that his pain was a 7 of 10. *Id.*

1 With respect to plaintiff's torn bicep tendon, the ALJ noted that plaintiff saw a doctor for
2 a right bicep tear and "was advised to use ice and Ibuprofen" and "that the symptom would not
3 limit his function and [he] should return as needed." AR 23; *see* AR 427.

4 An ALJ may discount a claimant's pain testimony based on a record of conservative
5 treatment. *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (upholding ALJ finding that
6 claimant's testimony "that she experienced pain approaching the highest level imaginable was
7 inconsistent with the 'minimal, conservative treatment' that she received"). The record again
8 supports the ALJ's finding to that effect here, as it contains no indication that plaintiff visited a
9 pain doctor, received pain management, was prescribed injections, narcotics, or was
10 recommended surgical intervention.

11 Further, determining that a claimant's complaints are "inconsistent with clinical
12 observations" may satisfy the clear and convincing requirement. *Regennitter v. Commissioner of*
13 *Social Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999). A claimant's pain testimony may not
14 be rejected "solely because the degree of pain alleged is not supported by objective medical
15 evidence," however. *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995). Here, the ALJ
16 properly considered objective medical results including clinical exams, chest x-rays, and a CT
17 scan of the cervical spine as part of his evaluation of plaintiff's testimony. AR 335, 536-37; *see*
18 20 C.F.R. § 404.1529(c).

19 As discussed above, plaintiff bases his challenge to the ALJ's decision on a list of
20 treatment notes and argues the ALJ misinterpreted the medical record. Dkt. 11, pp. 6-8. But the
21 ALJ was not required to interpret plaintiff's treatment notes in the way plaintiff desires – the
22 Court will uphold the ALJ's decision as long as it is free of legal error and substantial evidence
23 supports it. *See Allen*, 749 F.2d at 579. (The Court notes that, as with plaintiff's mental health
24

1 conditions, the record does not include any medical source opinion on how plaintiff's physical
2 conditions would limit his functioning.) Substantial evidence supports the ALJ's reasoning with
3 respect to plaintiff's physical-symptom testimony, and plaintiff identifies no legal error.
4 Accordingly, the Court must uphold the ALJ's decision with respect to plaintiff's physical
5 limitations.

6 *Vision Problems*

7 The ALJ found that plaintiff's treatment notes show only "minor vision problems." AR
8 23-24. He recounted plaintiff's recent history of treatment for vision problems, which include
9 diagnoses of refraction disorder and cataracts, for which plaintiff had surgery in May and July
10 2015. AR 320, 412-13, 441-42. He noted plaintiff was prescribed new glasses. AR 461 (October
11 2015). The ALJ noted that despite recent reports of blurriness, "the record does not reflect best-
12 corrected visual acuity of 20-200 or less." AR 24.

13 The ALJ also observed that plaintiff continues to drive, watch television, and read
14 "throughout the day"—activities he found "indicative of well-functioning vision." AR 24. The
15 ALJ stated, "[n]onetheless, I have considered the claimant's history of refraction and cataract
16 and have restricted him to jobs that would require only frequent near visual acuity." *Id.*

17 In challenging the ALJ's interpretation of the medical record, plaintiff points out that he
18 received surgery for his vision problems in May 2015. Dkt. 11, p. 8; *see* AR 258-59. The ALJ
19 discussed this and other treatment for plaintiff's vision, AR 23-24, and plaintiff again does not
20 identify any error in the ALJ's discussion of the medical records.

21 Plaintiff argues the ALJ erred in finding his ability to engage in "a wide array of
22 activities" requiring good vision to discount his testimony about the severity of his vision
23 problems. *See* AR 23-24. Plaintiff does not show harmful error, however: plaintiff testified that
24

1 his vision caused him to make mistakes in “read[ing] small numbers in cabinets next to a lot of
2 wires” and in “skipping steps” when walking up or down stairs. AR 40. Yet the ALJ assessed
3 that plaintiff’s RFC would limit plaintiff to “jobs that would require only frequent near visual
4 acuity.” AR 24.

5 In the absence of any apparent contradiction between plaintiff’s testimony and the RFC,
6 or a medical source opinion about the severity of plaintiff’s eyesight problems and their effect on
7 his functioning, the Court lacks a basis for overturning the RFC. *See Tommasetti v. Astrue*, 533
8 F.3d 1035, 1038 (9th Cir. 2008) (error is harmless where “it is clear from the record that the
9 ALJ’s error was inconsequential to the ultimate nondisability determination” [internal quotation
10 marks omitted]).

11 With respect to all of plaintiff’s health conditions—mental, physical, and visual—the
12 ALJ gave clear and convincing reasons to discount plaintiff’s testimony. Accordingly, the Court
13 does not need to address whether the ALJ erred in finding that plaintiff’s daily activities
14 contradicted his testimony about the severity of those conditions.

15 CONCLUSION

16 Based on the foregoing discussion, the undersigned finds the ALJ did not err in
17 determining that plaintiff was not disabled. Defendant’s decision to deny benefits is therefore
18 AFFIRMED.

19 Dated this 3rd day of October, 2018.

20
21
22 
23 Theresa L. Fricke
United States Magistrate Judge
24
25